

REMARKS

Reconsideration and withdrawal of the rejections of the Office Action are respectfully requested in view of the remarks herein.

I. STATUS OF THE CLAIMS AND FORMAL MATTERS

Claims 1- 44, 47 and 49 are currently pending.

No new matter is added.

II. THE REJECTION UNDER 35 U.S.C. §103 IS OVERCOME

Claims 1- 44, 47 and 49 were rejected under 35 U.S.C. §103 (a), as allegedly being unpatentable over Woldhuis (EP 0 403 030) in view of Van Der Graaf (5,405,626) or Van Der Graaf in view of Woldhuis. The rejection is respectfully traversed.

The Supreme Court has recently reaffirmed the factors set out in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18: “[T]he scope and content of the prior art are determined; differences between the prior art and the claims at issue are...ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.” *KSR International Co. v. Teleflex Inc.*, 127 S.Ct. 1727. Furthermore, as stated by the Court in *In re Fritch*, 23 U.S.P.Q. 2d 1780, 1783-1784 (Fed. Cir. 1992): “The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggests the desirability of the modification.” Also, the Examiner is respectfully reminded that for the Section 103 rejection to be proper, both the suggestion of the claimed invention and the expectation of success must be founded in the prior art, and not Applicants' disclosure. *In re Dow*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988).

Applying the law to the instant facts, the references relied upon by the Examiner do not disclose, suggest or enable Applicants' invention. The cited references do not teach or suggest the presently claimed invention. The Examiner has argued that it would have been obvious to one of ordinary skill in the art to use the coated cheese of Woldhuis in the pastry of Van Der

Graff to provide a filled puffed pastry with a waxy acetofat coating. The Examiner has argued that Woldhuis teaches a coating for cheese which:

"Was found to prevent or reduce the movement to water from the product" (page 3, lines 24-32).

However, Woldhuis actually states that:

"It is extremely surprising to note that the preparations which are obtainable according to the invention provide coatings which constitute an effective barrier against water vapour." [Emphasis added]

Hence, Woldhuis does not disclose that the coatings prevent or reduce the movement of liquid water. Instead, Woldhuis merely discloses that its coatings prevent the movement of water vapor, a gas i.e. prevent evaporation. In contrast, Van Der Graaf clearly states that (see column 1, lines 19-21):

"A problem arises, however, when this filling material is relatively moist, because the moisture readily migrates to the puffed pastry." [Emphasis added]

Thus, it is clear that the product in Van Der Graaf must prevent the penetration of moisture from the filling material into the puffed pastry. There is no teaching or suggestion anywhere in Woldhuis that the coatings which it discloses would be effective in preventing the penetration of moisture rather than the evaporation of water vapor.

Furthermore, Applicants submit that a person of ordinary skill in the art would not use the coated cheese of Woldhuis in the pastry of Van Der Graaf as suggested by the Examiner because these 2 references contain conflicting teachings and would be considered by a skilled person to be incompatible.

Woldhuis states that the coating layer should be "peelable" (see the "advantageous characteristics" listed on page 2, line 29 of Woldhuis). The importance of peelability to the teachings of Woldhuis is emphasized by the measurements of tensile strength for each of the barrier layers tested in Woldhuis. The requirement for a peelable barrier layer in Woldhuis is readily apparent from the use of the coating disclosed in Woldhuis is used as an alternative to the conventional wax coating for Edam cheese (see disclosure at page 11, lines 2-13). Hence, the coatings disclosed in Woldhuis are peeled prior to consumption of the cheese.

In contrast, it is a clear requirement of the moisture layer used in Van Der Graaf that it does not peel off. This is clarified in column 1, lines 32-36 of Van Der Graaf which discloses

that a problem with prior art fat-based coating materials when applied to puffed pastry is that they do not sufficiently adhere to the surface and "*peel off*". The invention disclosed in Van Der Graaf specifically addresses this problem and therefore is required not to be peelable.

Hence, we submit that a person skilled in the art would, as a consequence, not have looked to use the coated cheese of Woldhuis in the pastry of Van Der Graaf as suggested by the Examiner and, in particular, would not have used the layer described in Woldhuis in a multi-component food stuff as provided in the present invention. Thus, the presently claimed invention is non-obvious over the disclosures in Van Der Graaf and Woldhuis.

Reconsideration and withdrawal of the obviousness rejection under 35 U.S.C. §103 is therefore respectfully requested.


REQUEST FOR INTERVIEW

If any issue remains as an impediment to allowance, an interview with the Examiner and her supervisor, is respectfully requested, prior to issuance of any paper other than a Notice of Allowance; and, the Examiner is respectfully requested to contact the undersigned to arrange a mutually convenient time and manner for such an interview.

CONCLUSION

In view of the remarks herewith, the application is in condition for allowance. Reconsideration and withdrawal of the rejections of the application, and prompt issuance of a Notice of Allowance, are respectfully requested.

Respectfully submitted,
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